No. 15809

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

JOE PALERMO,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Appellant was charged by indictment in the United States District Court for the Eastern District of Washington, Southern Division, upon four counts of income tax

evasion for the four calendar years of 1950 to 1953, inclusive, for violation of 26 U.S.C. section 145 (b), (now 26 U.S.C. section 7201) in wilfully attempting to evade or defeat income taxes and the payment thereof for such years. (3-7)

Following appellant's plea of not guilty (25-27), and trial before a jury, a verdict of guilty on all four counts was rendered (13), and Judgment and Commitment was entered and filed July 30, 1957 by the trial court. (14-15) Appellant timely filed Motion for Acquittal or in the alternative for New Trial (15-16), which was denied by order of the court entered and filed September 9, 1957. (21-22) Notice of Appeal was filed September 9, 1957 (22-23), and Order Extending Time to File Record on Appeal was filed October 10, 1957. (24) Jurisdiction of the trial court was founded upon 18 U.S.C. section 3231, granting original jurisdiction to district courts of all offenses against the United States.

Appellant invokes the jurisdiction of this Court under the provisions of 28 U.S.C. section 1291, which provides that a Circuit Court of Appeals shall have jurisdiction of appeals from all final decisions of district courts.

STATEMENT OF THE CASE

Appellant, a logger of White Salmon, Washington, was indicted for income tax evasion for the calendar tax years of 1950 to 1953, inclusive (3-7). Following the entry of his plea of not guilty as to all four counts of the indictment (25-27), trial was had by jury, commencing July 23, 1957 before the Honorable Sam M. Driver, United States District Judge, Eastern District of Washington, at Yakima, Washington (27).

The main issue of the trial, as indicated by counsel in their opening statements to the jury (30-40), was whether appellant "knowingly and wilfully" attempted income tax evasion. Appellee sought to prove and did prove that for each of the indictment years appellant had underreported his income and underpaid income tax due thereon. Although the proof of underreporting included the net worth method (34, Pltf Exh 66), appellee relied mainly upon proof of understating of specific items of gross receipts (34). No attempt was made by appellee to attack the deductible business expenses taken by appellant on his returns (34), although there were mistakes in the returns as to such items (34). Appellant admitted the fact of underreporting for the indictment years (39), relying solely on the carelessness or inadvertence of maintaining a poor system of bookkeeping and negligence in providing information for the preparation of tax returns

(40).

To prove the underreporting of income, appellee introduced in evidence appellant's income tax returns for the years in question (Pltf Exh 3, 4, 5, 6; 43-45) and photostats of pages in appellant's record books showing sales of logs (Pltf Exh 71, 72, 73, 74; 188-189), to demonstrate the gross receipts as reported by appellant on his tax returns and as maintained in these record books. Appellee then introduced numerous exhibits consisting of records obtained from mills and companies who did business with appellant during the indictment years; such records included cancelled checks or photostats thereof, supporting invoices, journal sheets and log purchase records, showing payments to appellant by check. For purposes of simplifying the evidence for the jury all of this information was then summarized by Paul Simonson, revenue agent witness for appellee. These summaries included additional information provided by other exhibits showing deposits of income by appellant in his two bank accounts at the Bank of Stevenson, Stevenson, Washington, and the National Bank of Commerce at White Salmon, Washington. The summary for the year 1950 is Pltf Exh 86 (260, 287); for the year 1951, Pltf Exh 87 (262-268, 287); for the year 1952, Pltf Exh 88 (269-278, 287); and for the year 1953, Pltf Exh 89 (278-285, 288). These summaries may be further summarized as follows:

Year	Income	Recorded In Book	Not in Book	Deposited	Not Deposited
1950	$ 82,964.64	$ 66,090.94	$16,873.70	$ 80,444.20	$2,520.44
1951	120,129.70	98,178.22	21,951.48	118,948.79	1,180.91
1952	127,410.77	97,952.27	29,458.50	125,724.32	1,686.45
1953	116,865.89	102,901.73	13,964.16	111,886.16	4,979.73

Year	Income Sources	Checks Received	In Book	Not in Book	Dep'd	Not Dep'd
1950	7	53	37	16	45	8
1951	5	54	29	25	48	6
1952	12	67	28	39	57	10
1953	5	61	42	19	49	12

After establishing the true gross income of appellant for these years, appellee then made use of the deductible expenses as filed in the original income tax returns to compute the net income (or adjusted gross income for tax return purposes) to show the correct tax due for each of the four years as follows: 1950, by Pltf Exh 93 (318, 319); 1951, by Pltf Exh 94 (319, 320); 1952, by Pltf Exh 95 (320, 321); 1953, by Pltf 9xh 96 (321-323). In each of the indictment years, appellee's proof of net or adjusted gross income and income tax due correspond with the indictment, and established appellant's income tax delinquency as follows:

1950	$ 3,944.90
1951	8,454.18
1952	13,447.68
1953	5,432.36

Having established the underreporting of income and the underpayment of income tax for the indictment years, appellee then sought proof of criminal intent by introducing evidence of underreporting of income for the additional years of 1948, 1949, and 1954. For the first two years, appellee again introduced evidence of gross income by cancelled checks, photostats thereof, invoices, journal sheets, and log purchase records. These were then summarized by the revenue agent, Simonson, for the year 1948 in Pltf Exh 91 (293, 297) and for the year 1949 in

Pltf Exh 92 (300-302). These again demonstrated that for these two years, appellant had not recorded in his book all of his gross income, and, when compared with his tax returns for those two years (Pltf Exh 1 and 2; 43, 45, 246, 295), had not reported all of his gross income thereon.

The information contained in Pltf Exh 91 ncluded and was based in part upon information contained in Pltf Exh 77 (293); and that contained in Pltf Exh 92 included and was based in part upon information contained in Pltf Exh 78 (300). Pltf Exh 77 consisted of checks made payable by Lyle Lumber Company to Joe Palermo during 1948, which checks were found in a box on Lyle Lumber Company premises when that company was acquired by Thoren Lumber Company in 1953 (212-216). Pltf Exh 78 were similar checks for the year 1949 (212-216). No further identification was made.

When Pltf Exh 77, 78, 91, and 92, were offered in evidence, appellant objected to the introduction of 77 and 78 because of insufficient identification and also objected to 91 and 92, they being based upon 77 and 78, respectively (294, 295, 302).

Appellee's proof of underreporting of income for the year 1954 was through the testimony of Allen Brown, appellant's accountant. Brown testified that he first became acquainted with appellant in October, 1954, when ap-

pellant requested assistance because he was being investigated by Blankenship, revenue agent, as to his income tax returns (418). In 1955, Brown made out appellant's 1954 income tax return (437, 438). Despite appellant's knowledge at that time that he was being investigated by the internal revenue, about $4960.67 was omitted from his gross income in his 1954 return (439).

The additional evidence introduced by appellee for the purpose of showing criminal intent on the part of appellant concerned the submission of a financial statement by the accountant Brown to the revenue agents which did not include upon the assets side of the ledger a $10,000.00 savings account in the Bank of Stevenson (185, 418, Pltf Exh 66). Brown's testimony concerning this evidence indicated that he had prepared the information between the time he first met appellant in October of 1954 and its delivery to the revenue agents in December of 1954, and that he assumed all responsibility for the inadvertent omission of this item from the statement (418-420). Additionally, one of the revenue agents, Blankenship, was told, at his first meeting with appellant, that appellant had funds in the Bank of Stevenson (337, 338, 480, 481).

Appellant's evidence demonstrated that appellant, a naturalized citizen born in Canada in 1909, had grown up in western Washington, the son of a farmer (447, 448).

He went to the eleventh grade in school, and then became employed in a sawmill (448). For some years he worked for sawmill and logging operators until 1932 when he was married (448). From 1932 until the latter part of 1947, he worked for others in logging, both driving truck and cutting logs (448-449). During all this period of time he had no supervisory experience or duties, nor bookkeeping experience or training (452). During the latter part of 1947, his father-in-law, W. A. Zunke, sold appellant some logging equipment on time, and appellant commenced logging for hire (113-115, 450). Some two years later, appellant began acquiring timber lands for himself and restricted his logging operations to the cutting, hauling and selling of his own timber (451). When appellant commenced his business he did not have nor acquire the services of a bookkeeper or accountant (462). He attempted to keep his own records for each year, showing monies received, labor expenses, stumpage purchased, etc. (462, 463, Deft Exh 98, 99, 100). All entries were made by appellant in these books (461, 462). Appellant received his income by checks at various times throughout the year from his customers who were mill operators (463, Pltf Exh 86, 87, 88, 89). He was actively engaged in running his business of cutting and hauling logs from the woods to the mills, having only about six employees at the most (451, 465, 386, 387). His attempts at bookkeep-

ing were confined to evening hours and Sundays (387, 463-465). His hours of work were from about 6:30 A. M. to 6:00 P. M. or later (386, 387, 464). He attempted to pay his bills, make his income entries, and get his deposits ready at odd hours when possible (387, 388, 464, 465).

When he first started the process of having Mr. Bates, White Salmon insurance and real estate man, do his income tax returns, appellant took his books, bank deposits, etc. to Bates, who directed appellant to do the computing of income and expenses and bring the information to him (466, 467). Appellant, believing his books to be the same as his income, used the totals in his books in providing Bates with his gross income figures (467-472). Admittedly, these figures were wrong. However, appellant's testimony was that he attempted to record in his books all of his income, that he believed these figures of his gross income to be correct when given to Bates, that he believed his returns for the income tax prepared by Bates from this information were correct, and that he had no intent to evade his income taxes (462-472).

Appellant maintained a checking account at the Bank of Stevenson, Stevenson, Washington from 1948 to 1952, having originally established the account at the Bank's request, after financing a "cat" purchase through the Bank (474, 475). Upon the termination of this checking

account, he transferred the $10,000.00 into a savings account at that same Bank (419, 420, 475). Most all of appellant's banking of funds has been done through his checking account at the White Salmon Branch, National Bank of Commerce, White Salmon, Washington (475). This has been appellant's home town since before 1947 (449). White Salmon is a small town in south central Washington, adjacent to the Columbia River, having a population of about 1200-1500 people; close by is another small town, Bingen, in which are located most of the mill operators with whom appellant did business (353). Except for the checking and savings accounts in the Bank of Stevenson, practically all of appellant's income was deposited in the White Salmon Bank (Pltf Exh 86-89).

During the period following his start in business on his own appellant acquired four small rental houses in White Salmon, finished paying for the home which he had purchased before, bought mining stock in a locally organized mining corporation, and purchased timber lands, and logging equipment (453, 454, 457, 475, 476). Other than these purchases, he made no investments of size until 1954 when he purchased a hotel business in Hood River, Oregon, just across the Columbia River from his home in White Salmon (478). Three of the rental houses were

turned in on this purchase, the other being retained as a shop (497). Appellant did not make a thorough investigation of this business before purchasing, and later found out that the former owners had gone bankrupt operating the hotel (507). This situation was not altered, and during his ownership, appellant lost approximately $1,000.00 per month (436, 437).

Appellant and his family live in a modest frame home, acquired in 1950 for $10,000.00 (371, 453, 454). There was no evidence of money hidden in safety deposit boxes or secret bank accounts. There was no evidence of any attempt by appellant to secrete or conceal property of any kind or nature. In 1953, appellant purchased a Cadillac automobile on a conditional sales contract, having at that time in his checking account at White Salmon $55,606.62 (454, 455). In 1953, appellant filed an application for a timber cutting bond with McCoy Insurance Agency in White Salmon, as agents for American Bonding Company; included in the application was a financial statement wherein appellant set forth cash assets of $50,000.00 in the White Salmon Bank (Pltf Exh 31; 99-101, 104-109).

Character witnesses presented by the appellant included Keith McCoy, White Salmon insurance man who had known appellant fifteen years; W. A. Zunke, appellant's father-in-law, who had known appellant over twenty

five years; Marion Babb, White Salmon bank manager who had known appellant five or six years; Joe Crowe, White Salmon logger and Klickitat County Commissioner, who had known appellant twenty one years; Theodore Sprague, White Salmon logger and sawmill operator since 1945; and Edward P. Reed, White Salmon attorney, who had known appellant professionally and socially for six years (368, 377, 401, 405, 408, 411). These parties testified that appellant's reputation for honesty, truthfulness and as a law-abiding member of the community in the Bingen-White Salmon area was good (369, 380, 402-403, 406-407, 409, 412).

In addition to appellant's books (Deft Exh 98, 99, 100), there were placed in evidence all of appellant's cancelled checks, bank statements, and bank deposit slips (Deft Exh 108, 109; 459-461). Although these exhibits clearly demonstrate omissions of income and income sources in appellant's books (Deft Exh 98, 99, 100), appellant at all times retained these items and made them available to the revenue agents (460, 480, 481).

At the close of appellee's evidence, appellant moved for judgment of acquittal, which motion was denied (365-367). At the close of all of the evidence, appellant again moved for judgment of acquittal, which the court denied (515). Appellant submitted proposed instructions 1, 9,

11, 12, 16, 20, 21, 24 and 29 (7-13), which the court refused to give and to which appellant excepted before the jury retired to consider the verdict (567-576). The jury returned a verdict of guilty on all four counts of the indictment on July 30, 1957 (13), and on the same date Judgment and Commitment was entered and filed, fining appellant $2500.00 on each of the four counts and sentencing appellant to six months' imprisonment on each of the four counts, the sentences of imprisonment to run concurrently (14, 15). Appellant timely filed Motion for Judgment of Acquittal or in the alternative for New Trial (15-16) which the court denied by order of September 9, 1957 (21-22). Appellant thereupon filed notice of appeal on September 9, 1957 (22, 23).

SPECIFICATION OF ERRORS

1.

The trial court erred in denying appellant's motions for judgment of acquittal (16-22, 515).

2.

The trial court erred in failing to give appellant's proposed Instruction No. 1:

> "You are instructed to return a verdict of "Not Guilty" as to all four counts of the indictment against the defendant herein." (7)

> " . . . the defendant . . . excepts to the failure to give

Requested Instruction No. 1, being for a directed verdict based upon the argument previously presented that the evidence as it has been adduced here . . . for the same reasons that I have set forth at the conclusion of the evidence, for the reason that this does not exclude every reasonable hypothesis other than guilt, and the instruction therefore should have been given." (567, 568)

3.

The trial court erred in denying appellant's alternative motion for new trial (15-22).

4.

The trial court erred in failing to give appellant's proposed Instruction No. 9:

"If the evidence in this case can be reconciled either with the theory of innocence or guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted by the jury. You will review all of the facts and circumstances in the light of this instruction." (8)

"The defendant further excepts to the failure to give proffered Instruction No. 9, . . . It is submitted that the statement set forth in Instruction No. 9 is a proper statement of the law in that the evidence adduced here requires the instruction as the same may be consistent with either theory." (568)

5.

The trial court erred in failing to give appellant's proposed Instruction No. 11:

"Unless there is substantial evidence of facts which excludes every other reasonable hypothesis but that of guilt, and if all the substantial evidence is as consistent with innocence as with guilt, then it is your duty to return a verdict of not guilty." (8)

" . . . for the reason that the same constitutes a statement of the law and that the evidence requires the rendering of that statement to the jury." (568)

6.

The trial court erred in failing to give appellant's proposed Instruction No. 12:

"Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be established. It must be such as to exclude every reasonable doubt of the guilt of the defendant, and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, it is your duty to acquit the defendant.

"In order to convict on circumstantial evidence, the circumstances relied on must point unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis. The circumstances thus relied on must be proved by the United States to your satisfaction beyond a reasonable doubt, must be consistent with each other, and inconsistent with every other reasonable theory of innocence." (8)

"The defendant further excepts to the failure of the Court to give Proffered Instruction No. 12 with reference to circumstantial evidence by reason of the fact that the Court gave no full and complete instruc-

tion to the jury with reference to the consideration of circumstantial evidence and that offered instruction No. 12 sets forth a proper consideration of the law for the jury." (569)

7.

The trial court erred in failing to give appellant's proposed Instruction No. 16:

"The filing of an incorrect or inaccurate income tax return is unlawful as to the defendant, only if the defendant did so wilfully, with knowledge of its falseness, and with intent to evade taxes. There is no presumption of guilt which may be drawn from the act itself—both knowledge and wilfulness must be established by the independent proof, direct or circumstantial." (9)

"With reference to offered Instruction No. 16, I don't believe that the Court specifically instructed the jury that there was no presumption of guilt which will be drawn from the act itself. I can't recall. Assuming that there was not, I am saying that they should be advised because that is the law with reference to this case." (569, 570)

8.

The trial court erred in failing to give appellant's proposed Instruction No. 20:

"In order to secure conviction, it is necessary that the United States prove that the conduct of the defendant was wilful. The mere fact that an incorrect tax return was filed by him is not sufficient to in itself convict the defendant. If you believe that the defendant did not act wilfully, but did act mistakenly,

carelessly, negligently, or even recklessly, and that he did act in good faith without any wilful intent on his part to evade or defeat any income tax payment, or as the result of inadvertence, misunderstanding, or even careless bookkeeping, it is your duty to acquit the defendant." (9)

" . . . defendant excepts to the failure of the Court to give proffered Instruction No. 20 by reason of the fact that this proposed instruction also advises the jury that the fact of the filing of an incorrect income tax return is not sufficient in and of itself to convict the defendant, in that it sets forth the law relating to presumptions set forth in my preceding exception." (570)

9.

The trial court erred in failing to give appellant's proposed Instruction No. 21:

"You are instructed that in cases of this character, there is only one state of mind that can supply the intent necessary to sustain a conviction, and that is the specific intent to defeat or evade payment of the tax due; nor would the filing of a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the income tax that is due. The filing of any incorrect return, without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one had the right to do so, do not in themselves constitute wilful intent." (9, 10)

"The defendant excxepts to the failure to give proffered Instruction No. 21, on the same grounds set forth as to proposed Instruction No. 20. The same relates to the direction to the jury that there must be a spe-

cific intent to defeat or evade payment of tax due. Also with reference to the filing of the incorrect income tax return without ground for believing it to be unlawful, without justifiable excuse or careless disregard, do not constitute wilful intent." (571)

10.

The trial court erred in failing to give appellant's proposed Instruction No. 24:

"'Wilfully' means knowingly and with a bad heart or bad intent. It means having the purpose to cheat or defraud, or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, or reckless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books and records. He is not wilfully evading a tax if all that is shown is that he made errors. He is not wilfully evading a tax if he acts without the advice of an accountant or lawyer, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant in the keeping of his books or the preparation of his tax return." (10)

"With reference to proposed Instruction No. 24, defendant excepts to the failure to submit that instruction or as is substantially set forth in that instrucion, for the reason that in advising the jury of their determination of an intent or wilfulness the Court submitted certain factors to the jury for their consideration; that this proposed instruction includes additional facts." (572)

11.

The trial court erred in failing to give appellant's

proposed Instruction No. 29:

"The basic issue in this case between the Government and the defendant is the question of whether the admitted underreporting of income by the defendant was the result of a wilful attempt by the defendant to evade income tax for the years under consideration. The Government has the burden of proving to you beyond a reasonable doubt that the defendant did wilfully attempt tax evasion, which the defendant denies. 'Wilful attempt' consists of two elements, the attempt itself, and knowing criminal intent. In determining the question of 'wilful' before you may find against the defendant on any count of the indictment you must find beyond a reasonable doubt that at the time of the preparation and filing of defendant's income tax return for the tax year of such count, defendant had the specific intent to file an income tax return understating his income with the evil motive or bad purpose of thereby evading or defeating the payment of his proper income tax, that is, a criminal intent.

The intent, if any, with which an individual performs an act cannot be proved by others, normally, except by circumstantial evidence. Certain acts or conduct may be used by you in making a determination of whether or not the defendant had such specific criminal intent, while other acts or conduct may not. Acts or conduct from which an affirmative wilful attempt to evade may be inferred are such as deliberate concealing of assets, keeping two sets of books, making of false entries, invoices, or alterations in books, covering up sources of income, deliberate destruction of records, and other conduct the likely effect of which would be to mislead or conceal. However, the fact of understatement of income, the amount of the deficiency of tax or income, or disparity between

income received and income reported cannot be considered as a factor proving or tending to prove the specific criminal intent. No presumption of criminal intent arises merely because of the underreporting of income itself. In addition, acts, or conduct which are the result of carelessness, negligence, ignorance, or inadvertence may not be used to infer the specific criminal intent because such acts or conduct would negative the existence of the necessary condition of intent itself.

Further, in your consideration of such facts, if any be present in this case, it is essential, before you may infer specific criminal intent from any acts or conduct of the defendant, that such acts or conduct be consistent with the theory of the defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt.

Therefore, your process of consideration of the element of specific criminal intent on each count should be as follows: First, determine whether or not you can find beyond a reasonable doubt the existence of acts or conduct on the part of the defendant, from which, as circumstantial evidence, you feel you might infer the existence of a specific criminal intent in the defendant to evade or defeat his income tax. If you find no such acts or conduct at this point, you must acquit the defendant without further consideration. Second, if you do so find, then determine whether those acts and conduct are consistent with the theory of defendant's guilt, inconsistent with every reasonable theory of the defendant's innocence, and exclude every reasonable doubt of the defendant's guilt. If you conclude that these three conditions exist as to such facts, then you should find one of the essential factors necessary to determine the defendant's guilt—

the existence of the specific criminal intent. However, if having found such acts or conduct to exist, you do not find that they are consistent with the theory of the defendant's guilt, or if you do not find that they are inconsistent with every reasonable theory of defendant's innocence, or if you do not find that they exclude every reasonable doubt of the defendant's guilt, then or in either of those events, you must acquit the defendant." (10-13)

"And I take final exception to the failure to give Proposed Instruction No. 29 for the reason that the same is, I would say, a relatively short concise statement of the . . . of the situation that was being submitted to the jury and set forth in one instruction and briefly the law which they were required to consider in determining the defendant's guilt or innocence, and contained all of the factors necessary for their consideration as to the intent." (573)

12.

The trial court erred in the admission over objection of Pltf Exh 77, being checks of Lyle Lumber Company made payable to Joe Palermo during the year 1948, in that said checks were improperly and insufficiently identified to be admissible as evidence of payment of income to appellant during the year 1948 (212-216). This Exhibit was used in conjunction with other Exhibits and specifically in the creation of Pltf Exh 91 by appellee in its attempt to prove a pattern of underreporting and thus criminal intent (292-293).

"First of all, with reference to all of the exhibits for

identification recited by Mr. Bantz, and he has now offered, as immaterial; and secondly, with reference to 77 for identification . . . insufficient identification." (294)

13.

The trial court erred in the admission over objection of Pltf Exh 91, being a summary by the revenue agent Simonson of appellant's 1948 income from specific individuals or companies, the amount thereof recorded in appellant's books, not recorded in appellant's books, deposited in the bank and not deposited in the bank, for the reason that such was based in part upon other evidence improperly admitted, Pltf Exh 77, (292-293); such was prejudicial upon the determination of criminal intent of appellant, being offered for the purpose of showing a pattern of income to create the implication of intent.

"In reference to 91 by reason of its inclusion of the substance of the rest of the exhibits for identification, that the same has not been shown to or even tend to show matters which Mr. Bantz seeks to prove thereby as previously on the other exhibits as stated before." (294-295)

14.

The trial court erred in the admission over objection of Pltf Exh 78, being checks of Lyle Lumber Company made payable to Joe Palermo during the year 1949, in that said checks were insufficiently and improperly identified to be admissible as evidence of payment of income to

appellant during said year (212-216). This Exhibit was used in conjunction with other Exhibits and specifically in the creation of Pltf Exh 92 (by appellee in its attempt to prove a pattern of underreporting and thus criminal intent (299-301).

> "With reference to the offered exhibits for identification, your Honor, our objection goes to 15, 34, 43, 46, 78, 80, 92, on the basis that the same is immaterial, that the same do not have any tendency to prove that which Mr. Bantz claims that they would, and in addition with reference to Exhibit 78 for Identification, insufficient identification." (302)

15.

The trial court erred in the admission over objection of Pltf Exh 92, being a summary by revenue agent Simonson of appellant's 1949 income from specific individuals or companies, the amount thereof recorded in appellant's books, not recorded in his books, deposited in the bank and not deposited in the bank for the reason that such was based in part upon other evidence improperly admitted, Pltf Exh 78 (299-301); such was prejudicial upon the determination of criminal intent of appellant, being offered for the purpose of showing a pattern of underreporting of income to create the implication of criminal intent.

> " . . . the same is immaterial, that the same do not have any tendency to prove that which Mr. Bantz claims that they would . . . " (302)

ARGUMENT

SUMMARY OF ARGUMENT

The argument herein as to appellant's request for judgment of acquittal may be summarized upon the basis that there was no evidence presented at the trial independent of underreporting itself to prove or tend to prove the element of criminal intent; that because of this the verdict is not supported by the evidence; that further because of this the trial court should have granted appellant's motion for acquittal; that this Court should now direct a judgment of acquittal of the defendant on all four counts of the indictment.

As to the appellant's alternative request for new trial, appellant was prevented from having a new trial by the improper admission of exhibits to the prejudice of appellant, and by the failure of the trial court to properly instruct the jury in the law of the case; that in the event this Court denies appellant's request for acquittal, appellant should be granted a new trial.

APPELLANT ENTITLED TO JUDGMENT OF ACQUITTAL

Appellant was charged with violation of section 145 (b) of the Internal Revenue Code of 1939 in wilfully and knowingly attempting to evade and defeat income taxes due and owing by appellant and his wife for the calendar

years 1950 to 1953, inclusive. The charge made and proved against appellant was that during the indictment years he had failed to properly report all of his gross income, resulting in an understatement of net income and understatement and underpayment of income taxes. Appellant made no denial of the underreporting and, by reason thereof, the understatement and underpayment of income taxes. Appellant's defense was based upon his statement that he attempted to maintain a record of his gross receipts from the checks given in payment to his books; that because of carelessness, inadvertence, or of negligence, he did not record all income checks in his books; that he made use of his gross income figures from his books in providing information to Bates for the preparation of his income tax returns, he was not aware of such when so providing the information and filing his tax returns, and that therefore he did not "knowingly and wilfully" file the returns with intent to evade his income taxes.

This being a criminal case, appellee was required to prove beyond a reasonable doubt all of the essential elements of the crime charge as to each of the four counts of the indictment. These essential elements are that at the time of filing each income tax return for the years 1950 to 1953, inclusive,

(1) Appellant's return did not include all of his in-

come for the preceding calendar year;

(2) By reason thereof, appellant's return did not report and appellant did not pay sufficient income tax for such preceding calendar year;

(3) Appellant knew that the return did not correctly include all of his income and thus that he was not paying all income tax due for the preceding calendar year;

(4) Appellant filed the return with the specific criminal intent to evade or defeat the income tax due for the preceding calendar year.

For purposes of this argument, and as conceded at the trial, appellant admits that essentials 1 and 2 were proved by appellee beyond any reasonable doubt. However, as to essentials 3 and 4, appellant submits there was no evidence nor inference from the evidence to establish these factors. Inasmuch as the term "criminal intent" in this case would embrace "knowingly and wilfully" attempting to evade income taxes, reference hereinafter to these requirements will be limited to the former phrase.

In proving a case of income tax evasion, the United States must prove beyond a reasonable doubt the existence of the specific criminal intent on the part of the defendant to evade or defeat his income tax through independent evidence, that is, evidence other than the underreporting of income and underpayment of tax.

Holland v. United States, 348 U. S. 121, 99 L. ed, 150;
Spies v. United States, 317 U. S. 492, 87 L. ed. 418;
Morissette v. United States, 342 U. S. 246, 96 L. ed. 288;
Hargrove v. United States, 5 Cir., 67 F. 2d 820.

The doing of the act (the underreporting of the income and underpayment of the tax) does not establish the existence of the criminal intent.

Holland v. United States, supra;
Morissette v. United States, supra.

Intent, being a state of mind in which an act is done, can normally be shown only by circumstantial evidence; that is, evidence of conduct on the part of the defendant which justifies the conclusion that an attempt to evade was intended. As stated in *Spies v. United States,* supra, "affirmative wilful intent may be inferred from conduct, such as keep a double set of books, making false entries or alterations or false invoices or documents, destruction of sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and any conduct the likely effect of which would be to mislead or conceal." The foregoing does not include all possible courses of conduct from which criminal intent might be inferred but does indicate the type of proof which should be, and must be, made. And the evidence,

being but circumstantial, should point unerringly to criminal intent.

The judicial declarations of what constitutes sufficient proof of criminal intent are as varied as the cases; however, in general, some guides have been created:

(a) A consistent pattern of large understatements of income is not alone sufficient to sustain proof of intent, but is a strong circumstance when accompanied by other indicia of wilfulness. *Romm v. Commissioner*, 4 Cir., 245 F. 2d 730;

(b) The amount of the deficiency and the disparity between income received and reported are not to be considered as evidence of criminal intent. *United States v. Cindrich*, 3 Cir., 241 F. 2d 54.

(c) In net worth cases wherein the defendant has usually denied even the existence of income, and is without records, the courts have required less evidence of conduct additional to a consistent pattern of underreporting to sustain a finding of criminal intent. *Holland v. United States*, supra.

(d) At the very least, in cases involving more than one year, the courts have required evidence additional to a consistent pattern of underreporting, such as destruction of records, attempts to conceal income or assets, falsifying of records or invoices, maintaining more than one set of books or records, and similar affirmative conduct. *Spies v. United States*, supra; *United States v. Lindstrom*, 3 Cir., 222 F. 2d 761; *Sasser v. United States*, 5 Cir., 208 F. 2d 535; *Clark v. United States*, 8 Cir., 211 F. 2d 100; *Banks v. United*

States, 8 Cir., 204 F. 2d 666; *United States v. Zimmerman,* 7 Cir., 108 F. 2d 370.

From the negative standpoint, an accused does not have the requisite intent if the facts indicate that his conduct was the result of negligence, carelessness or recklessness; or even if he has acted without a justifiable excuse, or without grounds for believing his conduct to be lawful, or with a careless disregard for whether or not he has the right to so act.

Hargrove v. United States, supra;
Spies v. United States, supra;
Jones v. United States, 5 Cir., 164 F. 2d 398;
Bloch v. United States, 9 Cir., 221 F. 2d 786;
Gariepy v. United States, 6 Cir., 220 F. 2d 252;
Gaunt v. United States, 1 Cir., 184 F. 2d 284.

The foregoing is emphasized for the reason that the trial court denied appellant's motions for acquittal and submitted the case to the jury with no evidence other than underreporting of income for a number of years from which to infer criminal intent. To permit proof of criminal intent solely by proof of repeated acts, relinquishes the necessity of proving criminal intent at all; and further denies the existence of millions of people who daily and yearly, without criminal intent, repeatedly perform similar careless, negligent, and even reckless, acts.

What did appellee prove, circumstantially, as evidence of criminal intent. Nothing more than that during the years 1948 through 1954, appellant at no time correctly recorded and reported his gross income. There was no "consistent pattern" of underreporting. Appellant did not, for example, report income by checks and fail to report income by cash. All income was by check. Appellant did not consistently fail to report all income from one or more sources. Appellant did not consistently fail to report income during any certain period of the year. Appellant did not consistently fail to report small checks and report large checks. He merely failed to record in his books (Pltf Exh 98, 99, 100) all income. then believing his books to contain all gross income, used those figures for preparation of his tax returns by Bates (467-472).

Appellant did not keep a double set of books; rather he maintained a single set of books which he had personally set up but which were not correct (Deft Exh 98, 99, 100). The information which he took from his books and records for use by Bates in preparing his tax returns was incorrect both as to gross income and expenses, even though appellee did not attack the expenses in this action (34, 349-352). Appellant did not make false entries or alterations in his books; his books were incomplete in that they did not show all of his income, but they did not

contain false entries or alterations. Appellant did not make false invoices or documents; nor did he destroy evidence of income, assets, or sources of income. Rather he retained in his possession and without question provided to the revenue agents, not only his books but also his duplicate bank deposit slips, bank statements, and cancelled checks, which showed income sources inadvertently omitted from his books (Deft Exh 108, 109). Upon investigation, he fully cooperated in disclosing his records, his assets, and sources of income (460, 480, 481). Appellant did not handle his affairs in such a manner as to avoid making records usually made by those in his circumstances; he maintained his books, bank statements, cancelled checks, bank deposit slips in a normal manner except for errors. Appellant did not secrete funds in safety deposit boxes or in bank accounts under assumed names; he maintained bank accounts at Stevenson and White Salmon in his own name, in which he deposited practically all of his income (Pltf Exh 86, 87, 88, 89). Although appellee urged at the trial that appellant had attempted to hide the Bank of Stevenson savings account (327-328), by reason of its omission from a net worth trace submitted by appellant's accountant (Pltf Exh 66), the accountant accepted full blame for this omission, and it was demonstrated that some two months earlier, appellant had advised the revenue agent of the existence of funds

in that Bank (337, 338, 480, 481, 418-420).

A reading of the entire record clearly demonstrates that appellant did nothing from which criminal intent might be inferred; that is, there was no evidence, independent of the underreporting itself, of conduct "the likely effect of which would be to mislead or conceal." *Spies v, United States,* supra. Appellant, without formal education beyond the 11th grade of high school, was a wage earner from the time he quit high school in the twenties until he went into business for himself in late 1947 (447-449). Without benefit of advice he attempted to maintain his own books and conduct his own office at home, while at the same time actively running the business of logging in the woods (386 ,387,451, 461-465). It may be foolish conduct in the modern day of governmental regulation to keep an office in a desk at home and be without assistance in the keeping of books and records, but such is not criminal. Appellant's present problems are the direct result of the fact that his main efforts at all times were directed to the active personal operation and management of the business of logging timber in the woods, and did not include the proper establishment of office records.

Appellant's maintenance of records are demonstrated by his books (Deft Exh 98, 99, 100), which, without argu-

ment, are poorly kept. He attempted to keep a record in his books of income checks as they were received, though he did not do so successfully (462-472). His books are as inadequate in reflecting his expenses as in reflecting income, although appellee did not attack this matter in its case. Starting in the latter part of 1947, appellant became a business-man and employer rather than a truck-driver and employee. He became a man with gross income at times exceeding $100,000.00 per year (Pltf Exh 87, 88, 89), rather than a man whose gross income had averaged for some time around $4500.00 per year (449). Is it unnatural that he should believe the sum showing on his books as the gross income for a year was the true gross income? Mr. Bates, who made out appellant's tax returns and who averaged 150 returns per year in the White Salmon area, felt that the gross income figures were reasonable (92).

During the four indictment years, appellant received income from 5 sources for two of the years, 7 sources for one year, and 12 sources for one year (Pltf Exh 86, 87, 88, 89). All sources of income were within the White Salmon-Bingen area and all paid by check. In 1950, appellant recorded in his books and reported on $66,090.94 gross out of a total of $82,964.64, of which he deposited in his bank account $80,444.20 (Pltf Exh 3, 86). In 1951, he

recorded and reported on $98,178.22 gross out of a total of $120,129.70, of which he deposited $118,948.79 (Pltf Exh 4, 87). In 1952, he recorded and reported on $97,952.27 gross out of a total of $127,410.77, of which he deposited $125,724.32 (Pltf Exh 5, 88). In 1953, he recorded and reported on $102,901.73 gross out of a total of $116,865.89, of which he deposited $111,886.16 (Pltf Exh 6, 89). He retained in his possession all bank statements showing deposits, cancelled checks written upon bank accounts, and duplicate deposit slips showing sources of income. The depositing of these funds in excess of reported gross income in appellant's home town bank in White Salmon, a town of 1200 to 1500 population, coupled with the retention of deposit slips and bank statements disclosing deposits, balances, and income sources is not "conduct the likely effect of which would be to mislead or conceal."

Appellant made mistakes in failing to include all of his income in his books; however, he made additional mistakes by including in his books, and thus reporting as income, funds which he did not receive as income. One example of this can be found in Pltf Exh 86 and 98 wherein appellant recorded in his books the receipt of two income items from McCormick Lumber Company totalling $2784.00 in the year 1950, whereas in fact such income was never received from McCormick Lumber. Again, ap-

pellant reported a $900.00 income item from S. D. S. Lumber Company in 1950 (Pltf Exh 86, 98), whereas all investigation revealed such to be $148.58, and no more. This is not the conduct of a man having criminal intent to evade taxes. Rather it is the conduct of a poor bookkeeper and a negligent or careless businessman.

In 1953, appellant submitted an application and financial statement to McCoy Insurance Agency in White Salmon, as agents for American Bonding Company, for the purpose of obtaining a timber cutting bond. Included in the financial statement was disclosed an asset of $50,000.00 in the White Salmon Branch of the National Bank of Commerce; at the time of receiving the application, Mr. Legler, of McCoy Insurance, with appellant's approval, confirmed the amount of the checking account with the Bank (Pltf Exh 31; 106-107). This is most definitely not conduct the likely effect of which would be to mislead or conceal appellant's financial status or income.

Summarizing, the proof of intent introduced at the trial can only be found in the underreporting itself for the indictment years, plus 1948, 1949, and 1954. Any conclusion that criminal intent had been proved beyond a reasonable doubt would thus have to be based upon a factor which the courts have held shall not be considered

as an element of proof of intent. Appellee's method of trying appellant justifies this conclusion. With knowledge of mistakes by appellant in recording and claiming expense items for the indictment years (in fact, appellant's books recorded but a small number of expense items), appellee completely disregarded these mistakes and omissions, and for the sake of the trial, assumed the expense items to be correct (34). Then on final argument to the jury, the U. S. attorney argued that appellant had all of his expenses correctly recorded and substantiated, in an effort to convince the jury that appellant intentionally omitted income while accurately maintaining expense records (548, 549). In addition, appellee throughout the case emphasized and re-emphasized the amount of income omitted from the returns as compared with appellant's net income rather than with his gross income; this, of course, created the impression of greater intentional fault and less chance of negligence or carelessness. For example, in summarizing testimony through the revenue agent Simonson, appellee compares the net income as reported (describing it as adjusted gross income as on an income tax return) at $4553.00, with the omission of $16,873.70, making the discrepancy of the omitted funds extremely large in proportion (Pltf Exh 93; 318). In reality, if appellee was accepting appellant's expense items as correct, the comparison should have been one between the

sum of $82,964.64 received and $66,090.94 reported gross income (Pltf Exh 86). Appellee also placed great emphasis upon the number of checks received as compared with the number of checks omitted from the books (Pltf Exh 86, 87, 88, 89; 550). This method of proof of criminal intent, despite the trial court's ruling, is not proof by independent evidence. It is nothing more than a conclusion and argument based upon the underreporting itself. Appellant underreported income by failing to include all of his gross income in his books. This is made more specific and proved at the trial by placing in evidence all records of monies paid unto appellant by check. A summary of the number of checks received and reported, or a comparison of the funds received and reported is still only evidence of the underreporting. It cannot be reduced to mathematical calculations, then twisted into a statistical proof of criminal intent merely by calling it independent evidence. Our courts have repeatedly ruled that the doing of the act can not in itself be considered as proof of criminal intent where such intent is an essential to the crime. *Morissette v. United States*, supra. Yet in the instant case, appellee not only sought but accomplished the conviction of appellant on nothing more than proof of the act coupled with statistical reviews of the mathematical figures which proved the act.

Error is hereby predicated upon the failure of the trial court to grant appellant's motions for acquittal (15-16, 515), and upon the failure of the trial court to give appellant's requested Instruction No. 1, directing a verdict of "Not Guilty" as to all four counts of the indictment (7). Appellant excepted to the failure to give such instruction (567-568). Additionally appellant submits that the verdict of the jury is not supported by the evidence (15). By reason of any of the preceding matters, it is submitted that the verdict and judgment should be set aside and a judgment of acquittal entered as to all four indictment counts.

Concerning the failure of the trial court to grant appellant's motions for acquittal, in each instance (16-20, 365-367, 515), appellant drew the court's atttention to *Elwert v. United States,* 9 Cir., 231 F. 2d 928, 933, and the rule therein set forth that "the trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only, if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence." The trial judge refused to recognize the validity of this rule (16-20, 365-367, 515). This rule has not only been established in the foregoing case but also in:

Lattanzio v. United States, 9 Cir., 243 F. 2d 201;

Remmer v. United States, 9 Cir., 205 F. 2d 277;
Charles v. United States, 9 Cir., 215 F. 2d 831;
Bateman v. United States, 9 Cir., 212 F. 2d 61;
Schino v. United States, 9 Cir., 209 F. 2d 67;
Stoppelli v. United States, 9 Cir., 183 F. 2d 391;
State v. Charley, 48 Wn. 2d 126, 291 P. 2d 673.

A review of the evidence as set forth hereinabove establishes without question that appellee failed to prove the element of criminal intent because there was no showing of any conduct, by circumstantial evidence or otherwise, from which criminal intent might be inferred. Thus, reasonable minds as triers of fact must agree that reasonable hypothesis other than guilt could be drawn from the evidence, and judgment of acquittal should be entered at this time as to all four counts of the indictment.

With reference to appellant's claim that the verdict is not supported by the evidence, the test to be applied is set forth in *Vick v. United States,* 5 Cir., 216 F. 2d 228, 232 (approved in *Lattanzio v. United States,* supra:

> "In circumstantial evidence cases, this Court has said repeatedly that to sustain conviction the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of his innocence. . . . In such cases, the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of

> the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude."

Again, viewing all of the evidence herein, it is submitted that the jury might reasonably so conclude, following the rules herein set forth.

One final statement is now submitted by appellant in the desire to emphasize that the rules to be applied in net worth cases are somewhat different than in the instant case. In this case, the only issue was whether or not appellant "knowingly and wilfully" atempted tax evasion, and proof thereof was sought by appellee through circumstantial evidence. In a net worth case, a defendant normally has denied all phases of the crime, including underreporting or receipt of income, requiring the government to prove all of the elements of the crime by circumstantial evidence. The effect of the proof of income received, or the disparity between income reported and income received is of greater weight in establishing intent in a net worth case than in a case of the type herein being considered. This has been recognized in *United States v. Cindrich,* 3 Cir., 241 F. 2d 54, 57:

> "The amount of deficiency is not a consideration on the question of the guilty knowledge or intent element of the crime, although it may be an important

element where the deficiency itself is an issue, as in a net worth prosecution."

Appellant urges that this difference be given great consideration by this Court in determining appellant's request for acquittal. This was not a net worth case; appellant openly admitted at the trial an understatement; knowing criminal intent became the sole issue, to be proved by circumstantial evidence. Under these circumstances, the underreporting of income, the disparity between income received and income reported, the disparity between checks received and checks reported should not be considered as indicating proof of specific criminal intent. And without the use of such factors there is no independent evidence whatsoever, nor any inference therefrom, on which specific criminal intent may be founded.

This Court should direct an acquittal of appellant on all four counts of the indictment.

APPELLANT ENTITLED TO NEW TRIAL

Appellant is entitled to a new trial, in the event judgment of acquittal be denied, by reason of the refusal of the trial court to properly instruct the jury and by reason of error in the admission of documentary evidence.

A. Failure of the trial court to properly instruct.

This action was tried with the only basic issue for determination being that of knowing criminal intent on

the part of the appellant, appellee seeking proof by circumstantial evidence. Appellant's defense was lack of knowing criminal intent, demonstrated by direct evidence through specific denial and by circumstantial evidence indicating that appellant was either negligent, careless, reckless, or acted with a careless disregard for whether or not that which he did was correct.

The instructions of the court (552-567) consisted of a recitation of the charge (554), the presumption of innocence (556), a definition of reasonable doubt (556-557), the elements of the crime (557), a definition of wilful attempt (558) and its application (558-559), a reference to use of evidence of underreporting for 1948, 1949, and 1954 (559), a reference to direct evidence as distinct from circumstantial evidence (562), the effect of character evidence (563), and the use to which the revenue agent's summaries might be put (563-564). It is appellant's contention that the definition of reasonable doubt was insufficient, thereby requiring the "circumstantial evidence rule" as set forth in appellant's proposed Instructions No. 9, 11, 12, and 29 (7-13); that said rule was further required by reason of the inadequate reference to the direct evidence as distinct from circumstantial evidence (562). It is further appellant's contention that proposed Instructions No. 16, 20, 21, 24, and 29, (9-13) should have been

given for the reason that the instructions of the court did not fully instruct the jury as to appellant's defense, and that the court's instructions advised the jury of the use of evidence against appellant but omitted advice as to the use of evidence in favor of appellant. Appellant further submits that the instructions of the court did not properly define circumstantial evidence (562) as did proposed Instruction No. 12 (8). The court's instructions contained no direction that no presumption of guilt might be drawn from the act of underreporting (proposed Instruction No. 16; 9; proposed Instruction No. 29; 11).

1. Proposed Instruction No. 9

Under the evidence presented at the trial, the question for determination was the existence of knowing criminal intent. Any evidence presented was circumstantial only, and in the eyes of the jury could have been as consistent with innocence as with guilt. Proposed Instruction No. 9 (8) advised the jury that if the evidence could be reconciled either with the theory of innocence or guilt, they were required to adopt the theory of innocence. The court's instructions at no point so advised the jury. A similar but much stronger instruction was approved in *United States v. Schanerman,* 3 Cir., 150 Fed. 2d 941. By reason of the failure of the court to so instruct, appellant was denied the right to have the jury consider the evidence

from this standpoint, on which they might well have determined appellant's innocence.

2. Proposed Instruction No. 11

This proposed instruction (8) directed the jury to consider the evidence in the same manner as appellant requested the trial court's consideration in the motions for acquittal; that is, the jury would be directed to return a verdict of not guilty unless there be substantial evidence of facts which excludes every reasonable hypothesis but that of guilt, and if all substantial evidence be as consistent with innocence as with guilt.

This rule is applicable in considering a motion for acquittal.

Smith v. United States, 9 Cir., 233 F. 2d 744;
United States v. Elwert, supra;
Lattanzio v. United States, supra.

Described as the "circumstantial evidence" rule by the United States Supreme Court, it was held not required in that case so long as the trial judge properly instructs on reasonable doubt.

Holland v. United States, supra.

However, in the absence of other proper instructions, the refusal to charge that circumstantial evidence must

exclude every reasonable hypothesis other than guilt to support a conviction is error.

Anderson v. United States, 5 Cir., 30 F. 2d 485;

See also: *United States v. Gasomiser, Corp.,* 7 F. R. D. 712; and *Perkins v. United States,* 9 Cir., 237 F. 2d 857.

Here the trial court did not fully instruct on reasonable doubt, and instructed as to inferences favorable to appellee without instructing as to inferences favorable to appellant. Considering the entire instructions of the court, the failure to give proposed Instruction No. 11, embodying the "circumstantial evidence" rule, prevented the jury from properly determining the main issue of the case—knowing criminal intent. It is submitted that such instruction was necessary and would have altered the jury's verdict.

3. Proposed Instruction No. 12

The trial court instructed the jury solely that there were two types of evidence, direct and circumstantial (562), without fully instructing the jury as to the nature of circumstantial evidence and the essentials required to be present in order to convict on circumstantial evidence. The entire case of appellee and appellant was founded on circumstantial evidence. It was imperative that the jury be instructed in accordance with Instruction No. 12 (8) for the protection of appellant's rights. The defini-

tion provided by the trial court of circumstantial evidence was improper and incomplete, a fault cured by the proposed instruction. Because the court's instruction on reasonable doubt was insufficient in informing the jury of their duty in adapting the instruction to the question of criminal intent, and spoke only of reasonable doubt in general terminology, the jury was unable to understand the nature of circumstantial evidence and its application to the basic issue of the case. The proposed instruction would have so informed the jury.

4. Proposed Instruction No. 16

This instruction advised the jury that a distinction exists between the filing of a false return and the filing of a false return with intent to evade taxes; and further than no presumption of guilt might be drawn from the act itself (9). No such instruction was given by the trial court either in the same or similar wording.

That a distinction as above set forth does exist is without question. The rule that no presumption of guilt may be drawn from the act stems originally from *Morissette v. United States,* supra, and has been applied in tax evasion cases as well.

Lurding v. United States, 6 Cir., 179 F. 2d 419;
Spies v. United States, supra;
Vloutis v. United States, 5 Cir., 219 F. 2d 782.

In this case, appellant admitted the underreporting of income. The issue then became whether he had filed the incorrect income tax with knowledge and intent to evade taxes. In the absence of an instruction such as No. 16, the jury would be justified in concluding guilt from the act alone. The Court has a duty to at all times make the issues clear to the jury and explain inferences that can be drawn both for and against the accused.

Bernstein v. United States, 5 Cir., 234 F. 2d 475;
Holland v. United States, supra.

The failure of the court to give Instruction No. 16 did not explain inferences rightfully to be drawn in favor of appellant, and thus prevented a proper consideration of the evidence by the jury.

5. Proposed Instruction No. 20

The trial judge instructed the jury that "even gross carelessness, recklessness or negligence in the *preparation* of an income tax return, or honest errors of fact or law, is not fraud" (559). Such was misleading to the jury in view of the fact that the instruction relates to "preparation" of the tax return, and the evidence clearly showed that Mr. Bates prepared appellant's tax returns (78-79). The attempt of the trial court to clarify for the jury the appellant's rights in relation to carelessness, negligence, or recklessness thus resulted in confusing the jury. Appel-

lant's proposed Instruction No. 20 (9) properly directed the jury's attention to the acts of the appellant as they might be considered negligent, careless, reckless, etc.; the restriction to "preparation" did not coincide with the evidence presented in the case. Appellant's carelessness, negligence, or recklessness might well have been in the recording of gross income in his books, in the maintenance of records generally, in not checking his books with those from whom he received income to obtain his true gross income, in using incorrect information for delivery to Bates, or even in finally signing and mailing his tax returns with a reckless disregard as to whether or not it was correct.

A criminal defendant is entitled to have instructions presented relative to any theory of defense for which there is any foundation in evidence, no matter how weak or incredible that evidence may be.

United States v. O'Connor, 2 Cir., 237 F. 2d 466;

United States v. Indian Trailer Corp., 7 Cir., 226 F. 2d 595;

Tatum v. United States, 190 F. 2d 612, 88 U. S. App. D. C. 386;

Smith v. United States, 6 Cir., 230 F. 2d 935.

Appellant submits that the instructions as given by the court were incomplete and insufficient upon the points

of law which proposed Instruction No. 20 covers; that such insufficency denied appellant the right to have the jury consider all of the factors relating to "knowing criminal intent" as established by the evidence and on which appellant relied as a defense.

6. Proposed Instruction No. 21

This instruction (9-10) is similar to proposed Instruction No. 20 in presenting to the jury matters of defense on which the trial court failed to instruct, and appellant adopts the same argument set forth with reference to the failure to give proposed Instruction No. 20.

Additionally, the trial court at no time instructed the jury that the criminal intent necessary to sustain a conviction of appellant had to be the specific intent to defeat or evade income taxes, as required in *Holland v. United States,* supra, and *Bernstein v. United States,* supra. Specific criminal intent to evade income taxes was the only major issue in this case, and it was incumbent upon the trial court to specify clearly the requisites for conviction, rather than rely upon a general discussion of reasonable doubt. The lack of specific criminal intent was a matter of appellant's defense, on which there was some basis in the evidence; the jury might have concluded, if properly instructed, that appellant acted without justifiable excuse, or without grounds for believing his return to be lawful,

or with a careless disregard for whether or not he had a right to act as he did. Under the instructions as given, appellant may well have been convicted upon such a jury finding, which would result in acquittal if Instruction No. 21 were given.

7. Proposed Instruction No. 24

This instruction (10) is taken directly from *Gaunt v. United States*, supra, and was approved in *Bernstein v. United States*, supra. The instructions of the court (558) did not fully advise the jury as to the meaning of "wilful," and failed to correlate the term with the evidence in order to inform the jury as to what situations as presented by the evidence might be considered as negating "wilful attempt." Instead, the court limited its reference to carelessness in the "preparation" of the return, and provided appellee greater benefit by referring specifically to evidence of underreporting in 1948, 1949 and 1954 as being available for determination of criminal intent. Thus, the court failed to present evidence relative to any theory of defense for which there was foundation in the evidence, as required.

United States v. O'Connor, supra;
United States v. Indian Trailer Corp., supra;
Tatum v. United States, supra;
Smith v. United States, supra.

Further, the court did not anywhere instruct as to inferences which might be drawn from the evidence in appellant's favor, though instructing as to inferences which might be drawn from the evidence in appellee's favor, as above noted.

Although referring to the necessities in a net worth case, the United States Supreme Court supported appellant's view in *Holland v. United States,* at 129:

> "Charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."

See also *Bloch v. United States,* 9 Cir., 223 F. 2d 297.

By reason of the insufficiencies of the instructions as given by the court, and the refusal of the court to give proposed Instruction No. 24, appellant was deprived of the right to have the jury informed of the factors in evidence from which they might infer a lack of criminal intent.

8. Proposed Instruction No. 29

This instruction (10-13) constitutes a relatively concise statement of the law applicable to the instant case under the evidence presented at the trial concerning the basic issue of knowing criminal intent. The instructions

of the court (552-567) were incomplete and improper as set forth in Paragraph A above. There was a failure to properly instruct on reasonable doubt, circumstantial evidence, appellant's defenses, the "circumstantial evidence" rule, the lack of presumption of intent from the commission of the act itself, and the inferences to be drawn in appellant's favor from the evidence. This instruction did so fully, simply, and without confusion.

B. Erroneous Admission of Evidence

Appellant's claim of error in this respect is directed to the admission of four exhibits over appellant's objections, which exhibits were introduced for the purpose of proving underreporting in the years 1948 and 1949 in order that appellee might claim circumstantial proof of criminal intent through the establishment of a "consistent pattern of underreporting of income."

Pltf Exh 77 consisted of checks of Lyle Lumber Company made payable to Joe Palermo during the year 1948 and Pltf Exh 78 consisted of checks of the same company made payable to appellant during the year 1949. Identification was made by Everett Thoren, one of the owners of Thoren Lumber Company of Lyle, Washington, which Company had acquired the assets of Lyle Lumber Company in 1953 (212-216). Mr. Thoren testified that he received the books and records of Lyle Lumber Company

and included therein were the checks in these two Exhibits. He did not know anything about the checks or other records except that he had found them in a box. These checks were "apparently log checks." Over appellant's objections that there was insufficient identification, the trial court admitted both Exhibits (294, 296, 302).

Applicable hereto is 28 U. S. C. section 1732 (a):

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry on a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

In *N. L. R. B. v. Sharples Chemicals, Inc.*, 6 Cir., 209 F. 2d 645, it was held that the existence of a document or its presence in the file of a corporation does not, without more, render it admissible. In *Masterson v. Pennsylvania R. Co.*, 3 Cir., 182 F. 2d 792, it was held that a writing was not admissible merely because it may appear on its face to be a writing made by a physician in regular course of his practice.

Thus, it is submitted that the mere fact that Mr.

Thoren found some checks in a box when he took over Lyle Lumber Co. and that the checks are made payable to appellant neither make these checks admisible in evidence. without further identification, nor act as proof of payment to appellant of income during the years 1948 and 1949.

After this alleged identification of Exhibits 77 and 78, appellee offered in evidence Pltf Exh 91 and 92, being summaries for the years 1948 and 1949, respectively, created by the revenue agent Simonson from other exhibits; 91 was created in part from 77 and 92 in part from 78 (292-294, 299, 300). These summaries purported to set forth appellant's gross income as recorded in his books, as reported on his tax returns, and as actually received by appellant for the years 1948 and 1949. Each was admitted over the objection of appellant (294, 297, 302).

In *Hartzog v. United States*, 4 Cir., 217 F. 2d 706, an come tax evasion conviction was set aside because of the admission of work sheets prepared by a government agent which were based on other inadmissible work sheets.

Appellant submits that the admission of these four exhibits constituted reversible error because of their use by appellee in argument and the trial court in its instructions as evidence of a pattern of underreporting to prove knowing criminal intent; that coupled with the erroneous

instructions of the trial court (resulting from the refusal to give appellant's proposed instructions), the jury was permitted to make improper use of the exhibits in arriving at the verdicts of guilty.

CONCLUSION

With reference to appellant's request for judgment of acquittal, it is submitted that the same should now be granted for the reason that, as a matter of law, there was no evidence nor inference from the evidence on which a finding of knowing criminal intent can be based.

With reference to appellant's request for a new trial, it is submitted that appellant was subjected to prejudicial error in the admission of Pltf Exh 77, 78, 91, and 92; and that the failure of the trial court to submit appellant's proposed instructions permitted the conviction of appellant upon erroneous instructions of the law to the jury. As stated in *Morissette v. United States,* supra:

> "Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges."

Respectfully submitted,

JOHN S. MOORE
E. F. VELIKANJE

Attorneys for Appellant

APPENDIX

Table of Exhibits in Record

Exhibit No.	Identified	Offered	Received
1	43	45	295
2	43	45, 246	246
3	43	45	45
4	44	45	45
5	44	45	45
6	44	45	45
10	53	55	55
11	53	55	55
12	54	55	55
13	54	55	55
14	60	295	295
15	60	301	302
16	60	62	63
17	61	62	63
18	61	62	63
19	61	62	63
19-A	111	111	111
20	63	63	64
21	63	63	64
22	64	66	66, 297
23	65	66	66
25	67	315	316
26	71, 81, 238	239, 245	245
27	72, 81, 230	233	233
28	72, 232	233	233
29	72, 82, 234	234	234
30	73, 83, 236	236	237
31	99, 104	106	106
33	174	293	297
34	175	301	302
35	126	127	127
36	127, 128	128	128
37	129	130	130
38	130, 131	131	131

APPENDIX (Cont.)

Exhibit No.	Identified	Offered	Received
39	135	137	137
40	135, 136	137	137
42	141, 142	296	297
43	142	301	302
44	142	143	143
45	143	143	143
46	146	301	302
47	146	149	149
48	147	149	149
49	147	149	149
51	153	154	154
52	156	158	159
53	157	158	159
55	164	164	164
56	164, 165	165	165
57-A	169	170	170
58	177	178	178
59	179	179	179
60	177	178	178
61	183	184, 185	185
62	183	184, 185	185
63	183	184, 185	185
64	183, 184	184, 185	185
65	184	184, 185	185
66	185	187	188
67	185, 186	187	188
68	186	187	188
69	187	187	188
70	188	246	246
71	188	189	189
72	189	189	189
73	189	189	189
74	189	189	189
75	209	211	211
76	210	211	211
77	213	293	297

APPENDIX (Cont.)

Exhibit No.	Identified	Offered	Received
78	214	301	302
80	218	301	302
81	219	220	220
82	220	220	220
83	221	222	221
84	221	222	222
85	227	297	297
86	260	260	287
87	262-268	268	287
88	269, 278	278	287
89	278, 285	285	288
90	290	291	291
91	293	293	297
92	300	301	302
93	318	318	319
94	319, 320	320	320
95	320, 321	321	321
96	321, 322	322	323
98	424, 461	462	462
99	424, 461	462	462
100	424, 461	462	462
101	426	426	426
104	454	455	455
105	454	455	455
106	457	457	457
107	458	458	458
108	458	458	460
109	458	458	461